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No. 99-___ OFFICE OF THE CLERK

In The

Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

v.

PROBATE PROCEEDING, WILL OF ABRAHAM WARSASKI, DECEASED,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals, State Of New York

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourteenth Amendment Due Process Clause imposes any limitations upon a state trial court's denial of a motion for out-of-state counsel to appear *pro hac vice,* when the timing of the denial of such motion affects the fairness of the proceeding.

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PETITION FOR WRIT OF CERTIORARI

Marshall Spiegel petitions for a writ of *certiorari* to review the judgment of the Court of Appeals of the State of New York in this case.

OPINIONS BELOW

The opinion of the New York Supreme Court, Appellate Division, is unreported but is reprinted in the Appendix at 1. The order of the New York Court of Appeals denying Spiegel's motion for leave to appeal is also unpublished. It is reprinted at App. 7.

JURISDICTION

On February 23, 1999, the New York Supreme Court, Appellate Division, entered an Order denying Spiegel's appeal of the Decree of the Surrogate Court, New York County. On June 8, 1999, the New York Court of Appeals denied a motion for leave to appeal that decision. The deadline for filing a petition for writ of *certiorari* in this Court is September 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "[N]or shall any State deprive any person of life, liberty, or property,

without due process of law . . . . " U.S. CONST. amend. XIV, § 1.

STATEMENT

The underlying procedural context of the instant case is a matter before the Surrogate Court, New York County, to admit the will of one Abraham Warsaski to probate. Petitioner Marshall Spiegel, one of the sole surviving heirs of Warsaski, objected to the admission of the will on the ground that Warsaski lacked testamentary capacity. The case proceeded to trial on objections to that effect.

In May 1997, several months before the trial began, Spiegel's then-counsel, Richard Leng, withdrew from the case. Leng, an Illinois attorney not licensed in New York, had been admitted *pro hac vice* by the Surrogate Court. The court, which permitted Leng's withdrawal over Spiegel's objection, indicated that substitute counsel would be given leave to appear in Leng's stead if an association were arranged with a New York attorney who would serve as counsel of record. Specifically, the court noted a change in New York's rules for admission *pro hac vice* such that "any court, in its discretion, may admit an out-of-state attorney to participate in any matter, but that no attorney may be admitted *pro hac vice* unless he or she is associated with an attorney who is a member of the New York bar. . . . " App. 3. Thus, "[t]he objectants are advised that this Court will not admit another out-of-state attorney unless associated with a New York attorney who shall be counsel of record." *Ibid.* The proceeding was stayed so that Spiegel could retain new counsel. The

Surrogate Court at the same time notified the parties that a jury was to be selected on September 5, and the trial to begin on September 8, 1997. *Ibid.*

Spiegel's replacement counsel was Daniel Meenan, also an Illinois lawyer, and a longtime attorney for Spiegel. Meenan lodged his request for admission *pro hac vice* and immediately began to prepare for trial. When the Surrogate Court entered an order to the effect that Meenan would be admitted upon the co-appearance of a licensed New York attorney, that appearance was promptly filed.

Several weeks prior to the date for which trial was set, Spiegel's New York attorney inquired with the Surrogate Court to confirm that Meenan had been, or soon would be, formally granted leave to appear in the case as Spiegel's lead trial counsel. Only at that juncture was Spiegel advised that the court would not admit Meenan. Until that point, Spiegel's Illinois attorney had prepared the case for trial and had planned to proceed.

The Surrogate Court ultimately dismissed Spiegel's objections, and admitted the propounded instrument to probate as the Last Will and Testament of the deceased. With respect to Spiegel's contention that the denial of Meenan's *pro hac vice* status worked an unfairness to the prejudice of Spiegel, the trial court simply recited that the May 1997 decision in which the court instructed Spiegel as to the procedure for Meenan's appearance "also notified the parties that they were to select a jury on September 5, 1997 and commence trial on September 8, 1997." App. 4. Thus, concluded the court, "the record clearly establishes that objectants have had ample opportunity to

conduct their pre-trial discovery and over four months notice of the trial date. Objectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial." *Ibid.*

Spiegel appealed the Surrogate's adverse decision to the New York Supreme Court, Appellate Division, urging *inter alia* that the Surrogate Court's refusal to admit Meenan *pro hac vice*, and the court's failure to timely advise Spiegel of that decision, compromised the trial's fairness. The New York Supreme Court rejected that argument on the ground that Spiegel "was given sufficient notice by the Surrogate of the firm trial date to justify the Surrogate's denial of [Spiegel's] request for an adjournment by reason of his out-of-State attorney's scheduling conflict." App. 2.

The New York Court of Appeals subsequently denied without discussion Spiegel's motion for leave to appeal the Supreme Court's ruling.[1] App. 7.

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[1] While Spiegel did not cite the Fourteenth Amendment Due Process Clause in his briefs below as a reason for reversing the trial court's holding, the principle of fundamental fairness that is the essence of due process was clearly in play. This Court has recognized that the obligation to *adequately* raise federal claims in state court does not mean that such claims must be framed *perfectly*. "Our jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982).

REASONS FOR GRANTING THE PETITION

When fundamental values collide, "hard cases" are born. When fundamental values collide recurrently, and recurrently implicate a basic constitutional protection, this Court's intervention is often necessary to adjust or clarify the ground rules of the underlying litigation. Left unconsidered, the resulting state of affairs is intolerable because incoherence in the rule of law – the mishmash of principles aptly described by Justice Scalia in a different context as a "geometry of crooked lines and wavering shapes," *Lamb's Chapel v. Center Moriches Union Free Sch. Dis.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring, joined by Thomas, J.) is a genuine breach of justice.

This case offers the Court an opportunity to examine a collision of two such forces which today recurs at an increasing rate in state and federal courts alike: On one hand, the traditional principle that trial courts have unfettered discretion to control their proceedings; and on the other, the right of litigants to legal counsel of their choice.

The resolution of this conflict is vitally important. In an era when interstate law practice and multistate law firms is commonplace, is a trial court's denial of a *pro hac vice* motion *ever* constitutionally justiciable, or is the trial judge's discretion truly absolute? Does the Due Process Clause of the Fourteenth Amendment *ever* apply to trial court rulings of this sort? Does a lawyer *ever* have a constitutionally protected interest in his out-of-state practice? Or to the contrary, is the interest of a litigant in counsel of his choice, or the interest of his lawyer in out-of-state practice, always so trivial that a state court judge

literally has no obligation to consider the merits of a *pro hac vice* request, or to articulate a principled basis for denying a *pro hac vice* motion?

A. The Implicit Premises of the Lower Courts' Rulings. In the instant case, the lower courts provided no coherent rationale for rejecting Meenan's application for *pro hac vice* status, underscoring their orientation that denial of *pro hac vice* motions is wholly within the unlimited discretion of the trial judge. The Surrogate Court's response to Spiegel's objection that the timing and disposition of Meenan's motion compromised the fairness of the trial illustrates this. The trial court merely noted that the May 29, 1997 decision permitting Richard Leng's withdrawal also "stayed [the proceeding] so that objectants could retain new counsel," and "notified the parties that they were to select a jury on September 5, 1997 and commence trial on September 8, 1997." App. 4. From these grounds, the court concluded that "objectants have had ample opportunity to conduct their pre-trial discovery and over four months notice of the trial date. Objectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial." *Ibid.*

With due respect, we are at a loss to understand the Surrogate Court's logic. Meenan filed his request for *pro hac vice* status immediately upon the dismissal of Leng from the case. He thereafter began preparing for trial in rational reliance upon the Surrogate Court's instructions, specifically, that securing *pro hac vice* admission would not be a problem so long as New York counsel were also engaged. Thus, the court's suggestion that "[o]bjectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial," App. 4, is

nonsensical. The trial's unfairness was not self-inflicted; it was a result of the Surrogate Court's action with respect to Meenan's motion for admission.

For the same reason, the New York Supreme Court's rejection of Spiegel's contention on the ground that Spiegel "was given sufficient notice by the Surrogate of the firm trial date", App. 3, to justify the Surrogate's anomalous management of the case, misses the essential point.

Indeed, so strikingly illogical are the lower courts' glosses on Spiegel's argument, that it appears the courts employed a rationale that they did not in fact make explicit. The unspoken premises of these rulings are as follows: A nonresident lawyer has no right, as a matter of either state or federal law, to appear in a New York Court. Absent any such enforceable entitlement, based on an explicit rule or mutual understanding, the lawyer's interest in making a *pro hac vice* appearance is a mere "privilege" that New York may grant or withhold in the unrestrained discretion of individual judges. The conclusion that a party has no constitutional protection against a capricious exclusion of his counsel of choice can hardly follow from any alternative line of thought than this.

This view is reminiscent of similar syllogisms which the Court has long since repudiated – for instance, the notion that a parolee has no constitutionally protected interest in his status, a view which had its adherents well into this century. *See, e.g., Curtis v. Bennett*, 351 F.2d 931, 933 (8th Cir. 1965) ("A parole is a matter of grace, not a vested right. . . . [D]iscretion is left to the States as to the manner and terms upon which paroles may be granted

and revoked. Federal due process does not require that a parole revocation be predicated upon notice and opportunity to be heard"); *see also, Hyser v. Reed*, 318 F.2d 225, 237 (D.C. Cir. 1963), *cert. denied sub nom. Jamison v. Chappell*, 375 U.S. 957 ("In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege").

But in *Morrissey v. Brewer*, 408 U.S. 471 (1972) this Court, while accepting the premise that the parolee has no "right" to preserve his contingent liberty, nevertheless ultimately concluded that the nature of his status, coupled with the State's "implicit promise" that it would not be revoked arbitrarily, was sufficient to require constitutional protections. *Id.* at 481-482. As the Court observed, it "is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' " *Id.* at 482.

Although the instant case arises in a purely civil context, the analytical "gestalt shift" exemplified in cases such as *Morrissey v. Brewer*, is instructive. It is equally futile to attempt to deal with the problem presented by this case in terms of whether Petitioner's interest in his out-of-state lawyer's *pro hac vice* admission is based on an explicit or an enforceable entitlement, rather than a privilege. Instead, we must examine the nature of the out-of-state attorney's activity and the representation the Surrogate Court made to Spiegel regarding the prospect of Meenan's admission.

B. Due Process Principles Are Implicated by a Trial Court's Disposition of a Pro Hac Vice Motion. It is well

established, of course, that state trial courts have broad discretion to implement rules necessary to carry out the conduct of their business. This authority includes the regulation of *pro hac vice* admissions. But that discretion is not categorically unfettered. Where there is no indication that the out-of-state attorney is unqualified; where the court expressly instructs the affected party as to the procedure that would lead to the out-of-state lawyer's admission and those instructions are followed; where the trial court gives no indication that the motion for admission is problematic; and where the court is aware that, not only the party himself but also the associated state-licensed counsel, are relying upon out-of-state counsel's role in the case – it strains the most basic intuitions of procedural fairness to conclude that the court may nonetheless deny the *pro hac vice* motion for no discernible reason except that the court has the "discretion" to do so.

More than sixty years ago this Court recognized a due process right to retained counsel in civil proceedings. "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). If a state court may not arbitrarily prohibit retained counsel's presence in a courtroom, regardless of the state's rules of court, it is difficult to see why the same court's absolute power to deny a *pro hac vice* motion without any underlying rationale should not implicate due process.

Indeed, the notion that a state trial judge has arbitrary and unlimited power to refuse a nonresident lawyer

permission to appear in his courtroom, whatever grounding may once have supported it, is a remnant of a bygone era. Like the body of rules that once governed parole, the nature of law practice has undergone a metamorphosis during the past century. Work that was once the exclusive province of lawyers is now performed by title companies, real estate brokers, corporate trust departments, and accountants. Rules of ethics that once insulated the local lawyer from competition are now forbidden by the Sherman Act, *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783-784 (1975), and by the First Amendment to the federal Constitution, *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (Lawyers have a constitutional right to advertise because "significant societal interests are served by such speech"). Interstate law practice and multistate law firms are now commonplace. This is in part a "reflection of the growing general complexity of our society, . . . the gradual change in the character of law practice from a generalist skill to an increasingly specialized one; hence, the emergence of lawyers regarded and operating as . . . specialists . . . equipped to cope with problems that transcend jurisdictional boundaries and the legal competence of local generalists." Brakel & Loh, *Regulating the Multistate Practice of Law*, 50 Wash. L. Rev. 699, 699-700 (1975) (footnote omitted).

* * *

A state may not construe its own laws in a manner that denies an effective remedy for the vindication of rights under the federal Constitution, including perhaps most fundamentally, the right to due process. Thus, it is well established that state procedural rulings cannot be found to be independent of a claim that the procedural

rulings themselves cause a denial of due process. *See* 16 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 4025. Likewise, due process interests have been implicated in cases that center on the failure of a state court to provide a remedy for infringement of a federal right. *See, e.g., Ward v. Bd. of County Comm'rs of Love County*, 253 U.S. 17 (1920); *see also Reich v. Collins*, 513 U.S. 106 (1994) (due process requires a "clear and certain" remedy for taxes collected in violation of federal law) (citing *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912)); *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673 (1930) (due process violated when state court denied injunction against collection of unlawful taxes on basis of taxpayer's failure to pursue administrative remedies, where State's prior 'settled law' made clear that no such remedies existed).

New York state court judges routinely permit out-of-state counsel to appear *pro hac vice*. While it is unquestionably true that a New York trial judge has broad discretion in determining whether or not to allow non-resident lawyers to appear in his court, it is also true that New York rules, precedents, and practice give out-of-state lawyers an unequivocal expectation that the exercise of that discretion will be based on permissible reasons. New York thus has implicitly assured out-of-state practitioners that they are welcome in New York's courts unless there is a valid, articulable reason for excluding them. The state's assurance is adequate to create an interest that qualifies as protected within the meaning of the Due Process Clause. A state trial court's authority to

exercise discretion simply does not include the power to act arbitrarily.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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September 7, 1999

Sullivan, J.F., Ellerin, Williams, Wallach, JJ.

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Probate Proceeding,
Will of Abraham Warsaski,
Deceased,
Proponent-Respondent.

-against-

Marshall Spiegel,
Objectant-Appellant,

-and-

Michael Spiegal,

Objectant-Respondent.

Steven E. Rosenfeld
Pro se

Decree, Surrogate's Court, New York County (Renee Roth, S.). entered on or about October 16, 1997, which upon, *inter alia*, the surrogate's direction of a verdict dismissing the remaining objection to probate premised on the deceased's alleged lack of testamentary capacity objection, admitted the propounded instrument to probate as the Last Will and Testament of the deceased, unanimously affirmed, with costs.

The Surrogate properly refused to admit in evidence the manuscripts offered by the objectant to establish lack of testamentary capacity. Objectant could not authenticate them due to the strictures of CPLR 4919. Nor was there any waiver of those strictures effected by the attorney-executor's testimony, since the attorney-executor did not testify to any transactions between the deceased and the objectant, and since, as the attorney who prepared the will, he was permitted to testify about the circumstances surrounding the will's preparation (*see*, CPLR 4503(b);

Matter of Wood, 52 NY2d 139). Furthermore, there was no proof of intentional destruction of any relevant documents.

Finally, objectant was given sufficient notice by the Surrogate of the firm trial date to justify the Surrogate's denial of objectant's request for an adjournment by reason of his out-of-State attorney's scheduling conflict.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 23, 1999

/s/ Catherine O'Hogan Wolfe
CLERK

SURROGATE'S COURT : NEW YORK
STATE COUNTY OF NEW YORK
----------X
Probate Proceeding, Will of

ABRAHAM WARSASKI, Filed No. 4323/93

Deceased.
----------X

ROTH, S.

After trial before a jury in this contested probate proceeding in the estate of Abraham Warsaski, the Court directed a verdict in proponent's favor and dismissed the objection to probate.

Mr. Warsaski died on May 19, 1993, at age 66, survived by two nephews, Marshall Spiegel and Michael Spiegel, as his sole distributees. Under the propounded instrument, dated September 15, 1992, testator left his entire estate to charity and specifically disinherited his nephews. In addition to the propounded instrument, testator had executed three prior wills, in 1991, 1990 and 1986, in which he also left his estate to charity and specifically disinherited his nephews.

The nephews filed objections to probate in December 1993. By decision dated December 28, 1995, this Court dismissed all of their objections, except the one as to testamentary capacity. At trial, objectants failed to present any proof to support their allegation that decedent suffered from an insane delusion sufficient to raise a question of fact for consideration by the jury.

Objectants complained that they had inadequate opportunity to prepare for trial and conduct pre-trail [sic]

discovery. This proceeding, however, has been pending for almost four years and objectants' former attorney conducted extensive pre-trial discovery. The matter was originally scheduled for trial in 1996, but was adjourned until March 1997, at which time it was again adjourned because of the actual engagement of proponent's counsel. Thereafter, objectants' former counsel sought leave to withdraw. By decision dated May 29, 1997, the attorney's application was granted and the proceeding was stayed so that objectants could retain new counsel. Such decision also notified the parties that they were to select a jury on September 5, 1997 and commence trial on September 8, 1997. Thus, the record clearly establishes that objectants have had ample opportunity to conduct their pre-trial discovery and over four months notice of the trial date. Objectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial.

At trial, objectants failed to lay a proper foundation for the introduction into evidence of xerox copies of typewritten papers, allegedly typed by decedent, some of which purportedly also contained his signature or handwriting. The proposed opinion of objectant's expert, a psychiatrist, was based on these writings. Because the relevancy of these writings depended upon their authorship by decedent, proof of their authenticity was required. Although copies of some of the writings were attached to proponent's papers on his previous motion for summary judgment, he had never conceded their authenticity or admissibility but rather argued that they could not constitute the basis for an expert's opinion even if they were decedent's writings. In its decision denying

summary judgment to proponent on the issue of testamentary capacity, this Court was required to view the proffered evidence in the light most favorable to objectants and stated:

> "No proof has been offered that the writings are of a kind accepted in the profession as reliable in forming a psychiatric opinion, but, *for purposes of this motion*, the court *assumes, without deciding*, that these letters and other materials were written by decedent and that they would be admissible at trial." (emphasis added) (*Matter of Warsaski*, NYLJ, Jan. 4, 1996 at 27, col 2; reargued and adhered to, NYLJ, Feb. 15, 1996 at 29, col 3, affirmed in 228 AD2d 275).

During the trial, objectants requested an adjournment so that they could obtain handwriting experts and other witnesses who allegedly would be able to identify decedent's handwriting on the xerox copies. As previously noted, however, objectants had more than enough time to obtain such witnesses prior to trial, but had failed to do so.

The psychiatrist called by objectants had never met or treated decedent or examined his medical records. Because the papers which formed the basis for his opinion were not in evidence, his testimony was excluded. As the Court of Appeals has held " . . . opinion evidence must be based on facts in the record or personally known to the witness. . . . " (*Cassano v. Hagstrom*, 5 NY2d 643, 646). Neither element was present here.

Nor could the expert's opinion be established by posing hypothetical questions. Such questions may assume the existence of facts that may be fairly inferred

from the evidence, "[b]ut a question which assumes a material fact which has no support in the evidence is improper and must be excluded" (*see*, Price, Richardson on Evidence, §7-310 at 474 [11th ed., Farrell, 1995]). The record was devoid of any evidence upon which the expert's opinion, or a proper hypothetical question, could be based.

The proof establishes that the propounded instrument is genuine, that it was validly executed and that at the time of execution the decedent was competent to make a will and not under restraint (EPTL 3-2.1; SCPA 1408). Accordingly, the propounded instrument is admitted to probate.

Decree signed.

/s/ RRH
SURROGATE

Dated: October 16, 1997

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of June 1999

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-10 Mo. No. 426
In the Matter of Abraham Warsaski, Deceased,
Respondent,

v.

Marshall Spiegel,
Appellant,
and Michael Spiegel,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Judge Levine took no part.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court